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The Future of Mandatory Employee Arbitration Agreements

*Everglades Coll., Inc., & Fikki*¹

I. INTRODUCTION

The legality of Employee Arbitration Agreements has been a hotly debated issue,² and agreements that contain mandatory arbitration provisions or require waiver of class or collective actions have been at the center of the debate.³ In decisions such as *Everglades Coll., Inc., & Fikki*, the National Labor Relations Board (“NLRB” or “the Board”) has determined that, under the National Labor Relations Act (“NLRA” or “the Act”), mandatory employee arbitration agreements are invalid.⁴ At the same time, judicial decisions under the Federal Arbitration Act (“FAA”) have developed a liberal policy favoring the enforcement of arbitration agreements.⁵ This split of authority has implications for decision makers trying to interpret and apply the law, employers trying to utilize arbitration agreements, and employees seeking to maintain their guaranteed rights.

First, this note examines the historical interpretations of arbitration agreements under the FAA and the NLRA. Next, it explores the reasoning behind the discrepancies that exist between the judicial and administrative arbitration decisions. Additionally, this note assesses the lack of a uniform standard and its effect on decision makers, employers, and employees. Lastly, this note evaluates the potential implications of a liberal policy favoring arbitration in the context of mandatory employee arbitration agreements.

II. FACTS AND HOLDING

Lisa K. Fikki began working as a graduate admissions counselor for Everglades College, Inc. (“Everglades College” or “the College”), in 2008.⁶ In 2011, Everglades College decided to eliminate all of its paper employment records.⁷ Consequently, in 2012, the College required its current employees to complete an electronic process whereby each employee was required to sign or initial various employment documents and policies, including an Employee Arbitration Agreement (“EAA” or “Agreement”).⁸ The four-page EAA required, in pertinent part that: any employment-related claim be resolved through binding arbitration; a

1. Case 12-CA-096026, 2013 WL 4140317 (N.L.R.B Div. of Judges) (August 14, 2013).

2. See generally *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *In Re D. R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

3. *Id.*

4. See generally *Everglades Coll., Inc., & Fikki*, 2013 WL 4140317; *In Re D. R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012).

5. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

6. Case 12-CA-096026, 2013 WL 4140317 at *7. Everglades College, Inc. was a non-profit, private corporation that was doing business as Keiser University and Everglades University. *Id.*

7. *Id.* at *4.

8. *Id.*

class or collective action waiver; and an acknowledgement of the right to be represented by independent legal counsel.⁹ Fikki, who was among the current employees required to complete this electronic process, was told that signing or initialing the documents was a condition of continuing employment.¹⁰

Fikki was informed that the electronic process was to be completed by the initial deadline of June 22, 2012.¹¹ However, Everglades College's Chancellor and Chief Executive Officer advised current employees that a deadline extension was available to employees who produced a letter from an attorney, prior to the deadline, that verified the employee had an appointment with the attorney.¹² Fikki, who intended to seek legal advice regarding the EAA, complied with the extension guidelines, by submitting a letter that indicated Fikki would meet with an attorney, on July 18, 2012.¹³ Everglades College's Associate Vice Chancellor of Human Resources subsequently informed Fikki that the deadline was extended only to July 10, 2012 for all employees and that Fikki should make the necessary arrangements to complete the electronic process in time to meet the new deadline.¹⁴ Fikki did not meet with an attorney prior to the July 10 deadline, did not complete the required electronic process, and was discharged on July 12, 2012.¹⁵

In early 2013, Fikki filed a charge with the NLRB, and the Board subsequently issued a complaint against Everglades College, Inc.¹⁶ The complaint alleged that Everglades College violated section 8(a)(1) of the NLRA¹⁷ when it (1) re-

9. *Id.* at *5-6; "[Clause] 6. *Arbitration of Claims*. Any controversy or claim arising out of or relating to Employee's employment, Employee's separation from employment, and this Agreement, including, but not limited to, claims or actions brought pursuant to federal, state, or local laws regarding payment of wages, tort, discrimination, harassment and retaliation, except where specifically prohibited by law, shall be referred to and finally resolved exclusively by binding arbitration . . . Employee agrees that there will be no right or authority, and hereby waives any right or authority, for any claims within the scope of this Agreement to be brought, heard or arbitrated as a class or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the general public . . . [Clause] 11. *Independent Legal Counsel*. Each party hereby acknowledges that said party has had ample opportunity to seek independent legal counsel, and has been represented by, or has otherwise waived its right to be represented by, such independent legal counsel, with respect to the negotiation and execution of this Agreement." *Id.* Also, the EAA required employees to "reimburse [Everglades College] for all costs and expenses arising out of a breach of the agreement." *Id.* at *16.

10. *Id.* at *9. Not only was Fikki told that signing and completing the document was a condition of her continuing employment, but the EAA itself actually stated that the agreement was executed "in consideration of employment or continued employment" with Everglades College. *Id.* Additionally, the EAA stated that its requirements would "survive the termination of the employee's employment." *Id.* "Although the EAA invited employees to obtain legal counsel and negotiate over its terms, no employee actually did so." *Id.*

11. *Id.* at *8. Because the employees initially had difficulty accessing the documents, Everglades College extended the deadline to June 29, 2012. *Id.*

12. *Id.* at *9-10.

13. *Id.*

14. *Id.* at *10.

15. *Id.* at *10-11.

16. *Id.* at *1.

17. National Labor Relations Act, 29 USCA § 158 (West). "(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer— (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . ."; National Labor Relations Act, 29 USCA § 157 (West). "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." *Id.*

quired its employees to sign the EAA, the language of which led employees to believe they were unable to file charges with the NLRB, and (2) required employees to waive their right to participate in class or collective action, and (3) terminated Fikki's employment because she did not sign the EAA.¹⁸ Everglades College denied the alleged violations and defended the legality of its EAA and its actions.¹⁹

The NLRB, in an opinion by Administrative Law Judge Melissa M. Olivero, ruled in favor of Fikki.²⁰ Judge Olivero found that the EAA language at issue violated section 8(a)(1) of the NLRA because the Agreement reasonably led employees to believe that they were barred or restricted "from exercising their right to file charges with the National Labor and Relations Board."²¹ Further, Judge Olivero held that the EAA violated section 8(a)(1) when it required "employees to waive their right to collectively pursue employment-related issues."²² Lastly, Judge Olivero determined that Everglades College violated the NLRA when it discharged Fikki because the College "engaged in unfair labor practices affecting commerce."²³ Everglades College was required to rescind or revise the Employee Arbitration Agreement and offer Fikki reinstatement with back pay.²⁴ In sum, the Administrative Law Judge held that employers violate the NLRA when they require employees, as a condition of continuing employment, to sign arbitration agreements that employees reasonably believe restrict them from filing charges with the NLRB and require them to waive their rights to class or collective actions.²⁵

III. LEGAL BACKGROUND

The legality of employee arbitration agreements has been a hotly debated issue, especially those agreements that include mandatory arbitration provisions and require the waiver of class or collective actions.²⁶ Federal courts have consistently cited the FAA as controlling whether arbitration agreements are valid.²⁷ The most frequently litigated FAA claims involve section 2 of the FAA.²⁸ Section 2 treats arbitration agreements like contracts, and interprets the agreements using contract law principles.²⁹ Using this line of reasoning, courts have liberally construed arbi-

18. *Everglades Coll., Inc.*, 2013 WL 4140317, at *22-23.

19. *Id.* at *1.

20. *Id.* at *22-24.

21. *Id.* at *22-23.

22. *Id.*

23. *Id.* at *23.

24. *Id.* at *23-24.

25. *Id.* at *22-24.

26. *See supra* note 2.

27. "The FAA was originally enacted in 1925, 43 STAT. 883, and then reenacted and codified in 1947 as Title 9 of the United States Code. Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer*, 500 U.S. at 24.

28. Section 2 of the FAA states: "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2014).

29. *See Gilmer*, 500 U.S. at 26; *D. R. Horton*, 357 NLRB No. 184; *Concepcion*, 131 S. Ct. 1740.

tration agreements in favor of binding arbitration.³⁰ Conversely, the NLRB has treated claims involving violations of employee arbitration agreements very differently, relying on sections 7³¹ and 8³² of the NLRA.³³ In interpreting these sections of the NLRA, the NLRB has used a more conservative standard in analyzing the validity of mandatory employee arbitration agreements.³⁴ The law regarding such agreements, both under the FAA and the NLRA, has undergone significant changes since the 1990s, and continues to develop today.

A. Arbitration Agreements Under The FAA

Gilmer v. Interstate/Johnson Lane Corp.,³⁵ a 1991 United States Supreme Court decision, was a landmark case decided under the FAA. At issue in this case was an employee's required registration application,³⁶ which contained an arbitration agreement requiring arbitration of all claims against the employer.³⁷ Despite the agreement's language, the employee filed suit against his employer in district court alleging that his termination violated the Age Discrimination and Employment Act of 1976 ("ADEA").³⁸ The District Court for the Western District of North Carolina ruled in favor of the employee, but the Fourth Circuit Court of Appeals reversed.

Relying on section 2 of the FAA,³⁹ the Supreme Court affirmed the Appellate Court's decision and determined that the employee's age discrimination claim was subject to compulsory arbitration and could not be litigated in district court.⁴⁰ The Supreme Court explained that section 2 of the FAA manifests a "liberal federal policy favoring arbitration agreements."⁴¹ Citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court explained that the FAA protects the rights of parties to agree to resolve statutory claims, like the ADEA claim, in an arbitral

30. *Gilmer*, 500 U.S. at 25.

31. Section 7 of the NLRA:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3) of this title.

29 U.S.C. § 157 (2006).

32. Section 8(a)(1): "[u]nfair labor practices by employer. It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title . . ." 29 U.S.C. § 158 (2006).

33. See *D. R. Horton*, 357 NLRB No. 184; *U-Haul Co. of Ca. and Machinist District Lodge 190*, 347 NLRB 375 (2006); see also *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 255 (2009) (in which the Supreme Court explained, "The NLRA governs federal labor-relations law").

34. See *D. R. Horton*, 357 NLRB No. 184; *Martin Luther Mem'l Home, Inc.*, 343 NLRB 646 (2004); *U-Haul Co. of Ca.*, 347 NLRB at 379; *2 Sisters Food Grp., Inc.*, 357 NLRB No. 168 (Dec. 29, 2011).

35. *Gilmer*, 500 U.S. at 22.

36. The employer required *Gilmer* to register as a securities representative with several stock exchanges. Such registration was achieved by filling out certain securities registration applications.

37. *Id.* The arbitration agreement did not require *Gilmer* to waive class or collective claims but just required that all claims be arbitrated. *Id.*

38. *Id.*

39. See *supra* note 22.

40. *Gilmer*, 500 U.S. at 24.

41. See *supra* note 22.

forum, “as long as a party does not forgo the substantive rights afforded by the statute.”⁴²

Additionally, the Court explained that “the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration.”⁴³ Although the agreement at issue did not involve a class or collective waiver, the Court still addressed the issue that class relief, which cannot be granted by an arbitrator, does not interfere with the individual resolution of disputes with the arbitrator.⁴⁴ The Court further reasoned that administrative agencies could still grant class relief on behalf of such employees.⁴⁵ However, the Court noted that arbitration may substitute for a judicial forum only if the litigant can effectively vindicate his statutory rights through arbitration.⁴⁶ Because the Court found that the employee, Gilmer, was able to vindicate his rights under the ADEA through arbitration, the Court held that the arbitration agreement was valid.⁴⁷

In 1997, the Court of Appeals for the District of Columbia, relying on *Gilmer*, decided *Cole v. Burns Int’l Sec. Servs.*⁴⁸ The employment contract in *Cole* contained a mandatory arbitration agreement but did not provide which party would be responsible for the arbitrator’s fees and expenses.⁴⁹ In issuing its decision, the Court made a clear distinction between “the arbitration of collective bargaining agreements and mandatory arbitration agreements outside the context of collective bargaining.”⁵⁰ Further, the Court admitted that it was aware of the concerns about mandatory employee arbitration agreements, including the “potential inequities and inadequacies of arbitration in individual employment cases” and the ability of arbitrators to “enforce” public laws that protect employees in the workplace.⁵¹ Nevertheless, the Court held that it was required to follow *Gilmer* and found that

42. *Gilmer*, 500 U.S. at 24 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)).

43. *Id.* “For example, the Securities Exchange Commission is heavily involved in the enforcement of the Securities Exchange Act of 1934 and the Securities Act of 1933, but we have held that claims under both of those statutes may be subject to compulsory arbitration.” *Id.* at 28-29.

44. *Id.* “But ‘even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.’” *Id.* at 33 (quoting *Nicholson v. CPC Int’l Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)). “Finally, it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.” *Id.* at 33.

45. *Gilmer*, 500 U.S. at 33. “Finally, it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.” *Id.*

46. *Id.* The court admits that not all statutory claims are appropriate for arbitration, but if a party bargains to arbitrate then “the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” *Id.* at 26.

47. *Id.* at 35. Thus, the Court determined that “the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum . . .” *Id.* at 28.

48. 105 F.3d 1465 (D.C. Cir. 1997).

49. *Id.* at 1483-84.

50. *Id.* at 1467. “In [making our decision], we are mindful of the clear distinctions between arbitration of labor disputes under a collective bargaining agreement and mandatory arbitration of individual statutory claims outside of the context of collective bargaining.” *Id.*

51. *Id.* (acknowledging, “We are also cognizant of the numerous concerns that have been voiced by arbitrators, legal commentators, the Equal Employment Opportunity Commission (“EEOC”), and National Labor Relations Board (“NLRB”) regarding the potential inequities and inadequacies of arbitration in individual employment cases, as well as their concerns about the competence of arbitrators and the arbitral forum to enforce effectively the myriad of public laws protecting workers and regulating the workplace.”).

mandatory employee arbitration agreements are valid, as long as employees are not required to pay for the arbitrator.⁵²

A few years later, the United States Supreme Court handed down an even broader decision, in *14 Penn Plaza LLC v. Pyett*.⁵³ In *Pyett*, a labor union entered into an employee arbitration agreement, on behalf of its employees, which waived the employees' individual rights to bring statutory claims in federal court.⁵⁴ The Supreme Court found no difference between arbitration agreements signed by individual employees and those agreed to by union representatives.⁵⁵ Instead, the only significant requirement was that an agreement to arbitrate "statutory antidiscrimination claims must be explicitly stated in the collective bargaining agreement."⁵⁶ Thus, relying on its prior interpretations of arbitration agreements under the FAA,⁵⁷ the Supreme Court held that a union participating in collective bargaining may agree to an arbitration clause that waives its members' rights to file suit against their employers in court, for employment discrimination under the ADEA.⁵⁸

In 2011, the United States Supreme Court addressed class arbitration again, in *AT&T Mobility LLC v. Concepcion*.⁵⁹ California's state contract laws specified that class action waivers in arbitration clauses of adhesive consumer contracts were unconscionable and, thus, unenforceable.⁶⁰ However, the Supreme Court determined that the FAA preempted California's law, and held that class action waivers in consumer arbitration agreements are enforceable, under the FAA.⁶¹

Based on similar reasoning, in 2013 the Supreme Court decided *American Exp. Co. v. Italian Colors Restaurant*.⁶² This case involved merchants that filed a class action antitrust suit against American Express Company, a credit issuer.⁶³ When the merchants began accepting American Express cards, they were required to enter into a contract with the credit card user. The contract contained a mandatory arbitration clause, which only allowed individual arbitration.⁶⁴ The merchants brought a class action against American Express, alleging that the company "used its monopoly power in the market . . . to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards," in vio-

52. *Id.* at 1468. The statutory claims at issue included employees' right to bring an action in court alleging employment discrimination under Title VII and the ADEA. The Court stated, "We do not read *Gilmer* as mandating the enforcement of *all* mandatory agreements to arbitrate statutory claims; rather, we read *Gilmer* as requiring the enforcement of arbitration agreements that do not undermine the relevant statutory scheme." *Id.*

53. 556 U.S. 247 (2009).

54. *Id.* at 253.

55. *Id.* at 258.

56. *Id.* at 260 (finding that a provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims was enforceable as a matter of federal law).

57. The Court stated, "This Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." *Id.* at 266 (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (internal citations omitted)).

58. *Id.*

59. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

60. *Id.*

61. *Id.* at 1756 (emphasis added).

62. 133 S. Ct. 2304 (2013).

63. *Id.* at 2308.

64. *Id.*

lation of federal antitrust law.⁶⁵ The merchants argued that pursuing their claims through individual arbitration would be too cost prohibitive.⁶⁶

In evaluating the case, the Supreme Court discussed the purpose of the FAA, explaining that it “reflects the overarching principle that arbitration is a matter of contract.”⁶⁷ The Court ruled that the FAA must “rigorously enforce” arbitration agreements based on their terms.⁶⁸ The Court found that this even included the enforcement of agreements under which claims alleging the violation of a federal statute arise.⁶⁹ The Court explained that the only exception to its rigorous enforcement of arbitration agreements is if the FAA’s mandate is “overridden by a contrary congressional command.”⁷⁰ The Court ultimately held that “the FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.”⁷¹ These cases demonstrate the trend of federal courts upholding arbitration agreements.

B. Arbitration Agreements Under The NLRA

Unlike the Supreme Court’s Federal Arbitration Act (“FAA”) jurisprudence, the National Labor and Relations Board (“NLRB” or “the Board”) has invalidated employee arbitration agreements that are deemed to violate the NLRA. In a 2004 case, *Martin Luther Memorial Home, Inc.*, the NLRB affirmed the standard for review of NLRA Section 7 and Section 8(a)(1) claims.⁷² In this case, the Board found that it is settled law that an employer violates NLRA Section 8(a)(1)⁷³ when that employer enforces a work-related rule that reasonably chills employees’ Section 7 rights.⁷⁴ The Board explained that such rules place certain requirements and restrictions on employees’ work behaviors.⁷⁵ Under the standard, the Board must first determine whether the maintenance of a challenged rule is unlawful.⁷⁶ Such maintenance of a challenged rule is unlawful if the work rule “explicitly

65. *Id.*

66. *Id.*

67. *Id.* at 2309.

68. *Id.*

69. *Id.*

70. *Id.* (internal quotes omitted).

71. *Id.* at 2306.

72. 343 NLRB 646 (2004). (“The Board has repeatedly recognized that mere maintenance of overbroad work rules can violate Section 8(a)(1). *Lafayette Park Hotel*, 326 NLRB 824, 825, 828 (1998); *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978), *enfd.* 600 F.2d 132 (8th Cir. 1979).”).

73. NLRA § 8(a)(1) (“(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title . . .”).

74. *Martin Luther Mem’l*, 343 NLRB at 646. NLRA § 7 provides that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3) of this title.

Martin Luther Mem’l, 343 NLRB at 646.

75. *Id.* at 647.

76. *Id.* at 646.

restricts activities protected by Section 7.”⁷⁷ However, if the rule does not explicitly restrict Section 7 activities, then an employee-claimant must prove that (1) reasonable employees would construe the language to prohibit Section 7 activity, (2) the work rule was developed in response to union activity, or (3) the work rule has been applied to restrict the exercise of Section 7 rights.⁷⁸

Applying the same rules, the NLRB decided *U-Haul Co. of California*, in 2006.⁷⁹ *U-Haul* involved a mandatory arbitration agreement that employees had to sign as a condition of employment.⁸⁰ The agreement required arbitration of all claims “relating to or arising out of an employee’s employment with [U-Haul] or the termination of that employment.”⁸¹ The agreement listed specific examples of the types of claims covered by the arbitration agreement, and included a catchall provision that forbade employees from filing “any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations.”⁸² The Board interpreted the catchall provision as limiting the types of claims covered by the arbitration agreement, and found that provision did not explicitly restrict Section 7 activity.⁸³ Instead, the Board held that reasonable employees could construe the agreement as prohibiting employees from filing claims for unfair labor practices with the Board.⁸⁴ Consequently, the Board held that the arbitration agreement violated the NLRA and was unenforceable.⁸⁵

In *2 Sisters Food Grp., Inc.*,⁸⁶ a case factually similar to *U-Haul*, the NLRB decided that the employee arbitration agreement at issue, which required arbitration of all claims that “may lawfully be resolved by arbitration,” could reasonably lead employees to believe they were prohibited from bringing unfair labor practices claims against their employer.⁸⁷ In essence, the language of the agreement was so broad that it reasonably led employees to believe they were even prohibited from filing claims with the Board. Thus, the NLRB again determined that the employee arbitration agreement at issue violated the NLRA.⁸⁸

77. *Id.*

78. *Id.* at 647.

79. 347 NLRB 375, 377 (2006).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* However, the breadth of the policy language, referencing the policy’s applicability to causes of action recognized by “federal law or regulations,” would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. Plainly, the employees would reasonably construe the remedies for violations of the National Labor Relations Act as included among the legal claims recognized by Federal law that are covered by the policy. Thus, we find that the language of the policy is reasonably read to require employees to resort to the Respondent’s arbitration procedures instead of filing charges with the Board. *Id.*

85. *Id.* at 378.

86. 357 NLRB No. 168 (Dec. 29, 2011).

87. *Id.* at *2. “[As in *U-Haul*], the limiting language in the Respondent’s arbitration policy does not by its terms specifically exclude NLRB proceedings, and “most nonlawyer employees” would not be sufficiently familiar with the limitations the Act imposes on mandatory arbitration for the language to be effective.” *Id.*

88. *U-Haul*, 347 NLRB. at 378; *2 Sisters*, 357 NLRB No. 168 at *44.

C. Current Case Law & Split Authority

In 2012, the NLRB finally addressed the inconsistency between its analysis of arbitration agreements under the NLRA and the Supreme Court's FAA jurisprudence, in *D. R. Horton, Inc. and Michael Cuda*.⁸⁹ *D.R. Horton* involved a home-builder that operated in more than 20 states.⁹⁰ Horton, the employer, required its employees to sign an arbitration agreement, which provided that all employment-related disputes would be resolved through individual, rather than collective, arbitration.⁹¹ The issue before the NLRB was whether such restriction of an employee's right to bring claims against his employer, in any forum, directly violated the substantive rights granted to employees in sections 7 and 8 of the NLRA.⁹²

The Board explained that "Section 7 of the NLRA vests employees with a substantive right to engage in specified forms of associational activity."⁹³ The NLRB also discussed the FAA precedent established in *Gilmer*.⁹⁴ The Board found that, under the facts in *D.R. Horton*, there was no conflict between the NLRA and the Supreme Court's interpretation of the FAA.⁹⁵ The NLRB explained that the *Gilmer* decision allowed parties to substitute arbitration for a judicial forum only so long as the litigant could effectively vindicate his statutory rights through arbitration.⁹⁶ Additionally, the Board distinguished the Supreme Court's restriction on compelling class arbitration in *Concepcion*, as the arbitration agreement at issue in *Concepcion* was part of a consumer contract, not an employment agreement.⁹⁷ In *Horton*, however, the NLRB found that "employers cannot compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial."⁹⁸

The Board further explained that upholding employees' rights under the NLRA does not require the availability of class-wide arbitration, as long as employment agreements provide employees with a judicial forum for class and collective claims.⁹⁹ Thus, the NLRB held that employers may continue to require the

89. See generally *In Re D. R. Horton, Inc.*, 357 NLRB. No. 184.

90. *Id.* at *1.

91. *Id.*

92. *Id.* at *2.

93. *Id.* The Board continued, "It provides in relevant part that employees shall have the right 'to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection ...' 29 U.S.C. §157. It is well settled that 'mutual aid or protection' includes employees' efforts to 'improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.'" (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978)). "The Supreme Court specifically stated in *Eastex* that Section 7 'protects employees from retaliation by their employer when they seek to improve their working conditions through resort to administrative and judicial forums.' *Id.* at 565-566. The same is equally true of resort to arbitration." *In Re D. R. Horton, Inc.*, 357 N.L.R.B. No. 184, at *2.

94. *Id.* at *11.

95. *Id.* at *10. The NLRB noted, "However, the breadth of the policy language, referencing the policy's applicability to causes of action recognized by 'federal law or regulations,' would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. Plainly, the employees would reasonably construe the remedies for violations of the National Labor Relations Act as included among the legal claims recognized by Federal law that are covered by the policy. Thus, we find that the language of the policy is reasonably read to require employees to resort to the Respondent's arbitration procedures instead of filing charges with the Board." *U-Haul*, 347 N.L.R.B. at 377.

96. *In Re D. R. Horton, Inc.*, 357 NLRB No. 184, at *11.

97. *Id.* at *15-16.

98. *Id.* at *16.

99. *Id.*

individual arbitration of employees' claims under the NLRA, but may not completely foreclose an employee's access to collective action.¹⁰⁰

Many courts have criticized the NLRB's decision in *D. R. Horton*.¹⁰¹ In *Sutherland v. Ernst & Young LLP*, the Second Circuit Court of Appeals declined to follow *D. R. Horton*, arguing that the NLRB did not have the necessary quorum to make a decision.¹⁰² Courts that have declined to follow *D. R. Horton* have instead relied on *Concepcion*,¹⁰³ arguing that, after *Concepcion*, arbitration agreements that prohibit collective action are enforceable.¹⁰⁴ Although the NLRB's construction of the NLRA is entitled to deference, the NLRB has no special competence or experience interpreting the FAA.¹⁰⁵ Therefore, several courts have argued that, unlike the Supreme Court's decision in *Concepcion*, the NLRB's FAA decisions are not controlling.¹⁰⁶

Conversely, most NLRB opinions have cited *D. R. Horton* with approval and have adopted its reasoning.¹⁰⁷ These NLRB opinions contend that the Supreme Court precedent is inapplicable to NLRB cases, because the Supreme Court cases do not address the same facts or law.¹⁰⁸ Therefore, they contend that *D. R. Horton* is controlling in the employment law context.¹⁰⁹

In February 2013, appeal of the NLRB's *D. R. Horton* decision began, in the Fifth Circuit Court of Appeals. The case is still under review. In the meantime, NLRB Administrative Law Judge Olivero relied on *D. R. Horton* in deciding *Everglades Coll., Inc., & Fikki*.¹¹⁰ Numerous other Administrative Law Judges have subsequently followed *Everglades Coll., Inc., & Fikki* and have issued opinions based on the reasoning in *D. R. Horton*, rather than the Supreme Court's FAA decisions.¹¹¹

IV. INSTANT DECISION

NLRB Administrative Law Judge Melissa Olivero decided *Everglades College, Inc., & Fikki*, on August 14, 2013.¹¹² Judge Olivero first determined that Everglades College was an employer within the meaning of the NLRA, giving the

100. *Id.*

101. See *Sutherland*, 726 F.3d 290 (2d Cir. 2013); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831 (N.D. Cal. 2012); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

102. *Id.*

103. *Concepcion*, 131 S. Ct. 1740 (2011). In *Concepcion*, the Supreme Court held that, under the FAA, California must enforce arbitration agreements, even if they require that consumer complaints be arbitrated individually, foreclosing collective action. Under *Concepcion*, the FAA preempted California's judicial rule concerning the unconscionability of class arbitration waivers in consumer contracts. *Id.*

104. See *Sutherland*, 726 F.3d 290 (2d Cir. 2013).

105. *St. John's Mercy Health Sys. v. NLRB*, 436 F.3d 843, 846 (8th Cir. 2006).

106. *Id.*

107. See *supra* notes 72-89.

108. See *Cellular Sales of Mo, LLC & John Bauer*, 14-CA-094714, WL 4427452 (N.L.R.B. Div. of Judges Aug. 19, 2013); *Chesapeake Energy Corp. & Bruce Escovedo*, 14-CA-100530, WL 5984336 (N.L.R.B. Div. of Judges Nov. 8, 2013); *Securitas Sec. Servs. USA, Inc. v. Linares*, S 31-CA-072179, 2013 WL 5984335 (N.L.R.B. Div. of Judges Nov. 8, 2013).

109. *Id.*

110. *Everglades Coll., Inc., & Fikki*, 2013 WL 4140317 (N.L.R.B. Div. of Judges) (Aug. 14, 2013).

111. See *supra* note 108.

112. *Everglades Coll., Inc., & Fikki*, 2013 WL 4140317 at *7.

NLRB jurisdiction over the claims.¹¹³ The Board explained that the employer, Everglades College, violated section 8(a)(1)¹¹⁴ of the NLRA when it implemented work requirements that explicitly restricted its employees' ability to exercise their section 7 rights.¹¹⁵ In addition, the employer violated section 8(a)(1) by maintaining "work rules that tend[ed] to chill employees in their exercise of their Section 7 rights."¹¹⁶

Judge Olivero explained that an employer's work rule that *explicitly restricts* an employee's exercise of his section 7 rights is a direct violation of the NLRA, regardless of the employer's intent.¹¹⁷ On the other hand, in order for an employee to prove that an employer's work rule *chilled* his exercise of his section 7 rights, the employee must prove by a preponderance of the evidence that the employer's work rule (1) could have reasonably been construed to prohibit section 7 activity, (2) was adopted due to union activity, or (3) was implemented to restrict employee section 7 activity.¹¹⁸

Applying these standards to the facts in *Everglades College, Inc., & Fikki*, the Board found that Everglades College's Employee Arbitration Agreement ("EAA" or "Agreement") did not "explicitly restrict employees" from filing claims with the NLRB, since the EAA's requirement that all employee claims be arbitrated contained the exception, "except where specifically prohibited by law."¹¹⁹ Reasoning that employees cannot be required to understand all federal, state, and local laws specifically prohibiting mandatory arbitration,¹²⁰ the Board ruled that the EAA would "reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board." Thus, rather than explicitly restricting an employee from filing claims with the NLRB, the Board found that the EAA's broad and ambiguous language could lead reasonable employees to believe they

113. *Id.* at *20. "Respondent . . . is an employer engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the [NLRA] and that the Union is a labor organization within the meaning of Section 2(5) of the [NLRA]." *Id.*

114. National Labor Relations Act, 29 U.S.C.A § 158 (West) ("[Section 8] (a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer-- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . .").

115. National Labor Relations Act, 29 U.S.C.A § 157 (West).

[Section 7] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3) of this title.

Everglades Coll., Inc., & Fikki, 2013 WL 4140317 at *11 (citing *Luther Heritage Village-Livonia*, 343 NLRB 646 (2004)).

116. *Everglades Coll., Inc. & Fikki*, 2013 WL 4140317 at *11.

117. *Id.* (citing *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 375-76 (D.C. Cir. 2007)). This builds off of *Martin Luther Mem'l Home, Inc.* See *supra* notes 34, 74.

118. *Everglades Coll., Inc., & Fikki*, 2013 WL 4140317 at *11.

However, where a workplace rule does not explicitly restrict Section 7 activity, the General Counsel must establish by a preponderance of the evidence that: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the employer adopted the rule in response to union activity; or (3) the employer applied a rule to restrict employee Section 7 activity.

Id. (citing *Luther Heritage Village-Livonia*, 343 NLRB 646 (2004)).

119. *Everglades Coll., Inc., & Fikki*, 2013 WL 4140317 at *12-13.

120. *Id.* at *13-14. The NLRB found that the EAA's ambiguous exception should be construed against Everglades College. *Id.*

were barred from filing charges with the NLRB.¹²¹ As such, the NLRB held that Everglades College's EAA violated section 8(a)(1) of the NLRA, because it had a chilling effect on employee Lisa Fikki's exercise of her section 7 rights.¹²²

Next, the Board reviewed the EAA's requirement that employees waive their rights to class or collective actions.¹²³ Relying in large part on the same reasoning stated above and emphasizing its reasoning in *D. R. Horton*, the Board held that an employer cannot require employees to waive "their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial."

Everglades College argued that its EAA did not prevent employees from taking collective action, as it allowed employees to file claims with the NLRB, which had the authority to pursue class or collective actions, on behalf of employees, in court.¹²⁴ The Board rejected this argument, explaining that the EAA's broad, ambiguous, and vague language would "reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board."¹²⁵ Further, the EAA deterred employees from seeking judicial redress, because the terms of the EAA required an employee to reimburse Everglades College for "all costs and expenses arising out of a breach of the agreement."¹²⁶ Therefore, the NLRB held that the EAA's requirement that employees waive their rights to bring employment-related class or collective actions against Everglades College violated section 8(a)(1) of the NLRA.¹²⁷

Lastly, the NLRB held that, because the EEA was unlawful, Fikki's discharge for failing to sign the EAA was also unlawful.¹²⁸ Everglades' discharge of Fikki

121. *Id.* at *12-13.

I find that the EAA's broad language, applying to all causes of action for discrimination or harassment under Federal, State, or local laws, would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. It is axiomatic that the National Labor Relations Act is a Federal law prohibiting discrimination based upon union or other protected, concerted activity. An employee could easily construe the EAA to require arbitration of claimed violations of the Act, a Federal law. Therefore, I find that that the language of the EAA is reasonably read to require employees to resort to Respondent's arbitration procedures instead of filing charges with the Board.

Id.

122. *Id.* at *5-6; [Clause] 6.

Arbitration of Claims. Any controversy or claim arising out of or relating to Employee's employment, Employee's separation from employment, and this Agreement, including, but not limited to, claims or actions brought pursuant to federal, state, or local laws regarding payment of wages, tort, discrimination, harassment and retaliation, except where specifically prohibited by law, shall be referred to and finally resolved exclusively by binding arbitration . . . Employee agrees that there will be no right or authority, and hereby waives any right or authority, for any claims within the scope of this Agreement to be brought, heard or arbitrated as a class or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the general public.

Id.

123. *Id.*

Employee agrees that there will be no right or authority, and hereby waives any right or authority, for any claims within the scope of this Agreement to be brought, heard or arbitrated as a class or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the general public.

Id. (citing *In Re D. R. Horton, Inc.*, 357 NLRB No. 184 at *12-13).

124. *Everglades Coll., Inc., & Fikki*, 2013 WL 4140317 at *17.

125. *Id.* at *17-18.

126. *Id.* at *16-17.

127. *Id.*

128. *Id.* at *18 (citing *Supply Technologies, LLC*, 359 NLRB No. 38 slip op. at 1 (2012)).

was an “unfair labor practice[] affecting commerce,” in violation of sections 8(a)(1) and 2(6) and (7) of the NLRA.¹²⁹ The Board rejected Everglades College’s argument that numerous courts have upheld collective action waivers in arbitration agreements, explaining that the NLRB is required to follow NLRA precedent that “neither the Board nor the Supreme Court has reversed.” Everglades College was required to rescind or revise the EAA and offer Fikki reinstatement with back pay.¹³⁰ The NLRB held that employers violate the NLRA when they condition continued employment on signing an arbitration agreement that reasonably restricts the employee from filing charges with the NLRB and requires employees to waive their rights to all collective actions.¹³¹

V. COMMENT

Everglades College, Inc., & Fikki represents the NLRB’s developing jurisprudence, restricting the use of mandatory employee arbitration agreements, especially those that require employees to waive their right to collective action.¹³² The decision demonstrates the NLRB’s continued progression from the FAA’s “liberal federal policy favoring arbitration agreements.”¹³³ The split of authority between the NLRA and FAA has made it difficult to apply the law regarding mandatory employee arbitration agreements.¹³⁴ As *Everglades College, Inc., & Fikki* and recent decisions that following it demonstrate, the split continues to deepen, making interpreting and applying the law increasingly challenging.

The decisions applying the NLRA’s stricter interpretation of employee arbitration agreements frequently mention that the Supreme Court has not addressed the interrelationship between the NLRA and the FAA, as it specifically applies to mandatory employee arbitration agreements.¹³⁵ The NLRB decisions recognize the Supreme Court’s FAA precedent, but argue that such cases are inapplicable because they do not address the same facts or law.¹³⁶ Consequently, NLRB Judges have implied that, until the Supreme Court addresses the interrelationship between the NLRA and the FAA in the context of employee arbitration agreements, the

129. *Id.* at *23.

130. *Id.* at *23-24.

131. *Id.* at *22-24.

132. *See* Cellular Sales of Missouri, LLC & John Bauer, 14-CA-094714, 2013 WL 4427452 (N.L.R.B. Div. of Judges Aug. 19, 2013); Chesapeake Energy Corp. & Its Wholly Owned Subsidiary Chesapeake Operating, Inc. & Bruce Escovedo, 14-CA-100530, 2013 WL 5984336 (N.L.R.B. Div. of Judges Nov. 8, 2013); Securitas Sec. Servs. USA, Inc. & Charles Dunaway & Walter Linares, S 31-CA-072179, 2013 WL 5984335 (N.L.R.B. Div. of Judges Nov. 8, 2013).

133. *See supra* note 4.

134. *See* Cellular Sales of Missouri, LLC & John Bauer, 14-CA-094714, 2013 WL 4427452 (N.L.R.B. Div. of Judges Aug. 19, 2013); Chesapeake Energy Corp. & Its Wholly Owned Subsidiary Chesapeake Operating, Inc. & Bruce Escovedo, 14-CA-100530, 2013 WL 5984336 (N.L.R.B. Div. of Judges Nov. 8, 2013); Securitas Sec. Servs. USA, Inc. & Charles Dunaway & Walter Linares, S 31-CA-072179, 2013 WL 5984335 (N.L.R.B. Div. of Judges Nov. 8, 2013).

135. *Id.*

136. *See also* Chesapeake Energy Corp., 14-CA-100530, 2013 WL 5984336 (Where the NLRB stated that, “The claim brought by the merchants in *American Express Co.*, is distinguishable [from the claim at issue here] in that it was for a violation of antitrust laws. Unlike *D.R. Horton* and the case at issue, the merchants were alleging not that they were precluded from pursuing their claim but rather the cost to do so individually would be prohibitive.” *Cellular Sales*; In this regard, I note that the identical issue presented in this case was not addressed in the Supreme Court’s *American Express* decision.).

NLRB will continue to follow *D.R. Horton*.¹³⁷ As such, the NLRB will likely continue to invalidate arbitration agreements in favor of employees.

In direct contrast to the NLRB's reasoning, Courts construe arbitration agreements liberally under the FAA, favoring arbitration.¹³⁸ Proponents of the Supreme Court's liberal interpretation of the FAA argue that NLRB decisions interpreting both the NLRA and the FAA are not entitled to deference, as the NLRB has no special competence or experience interpreting the FAA.¹³⁹ Thus, many argue that while the NLRB's construction of the NLRA is entitled to some deference, decisions like *D.R. Horton*,¹⁴⁰ interpreting the FAA and the NLRA, should be overturned.¹⁴¹ FAA proponents have also consistently argued that *D.R. Horton* was decided under an improper quorum.¹⁴² In fact, several courts have refused to consider the *D.R. Horton* ruling when deciding cases regarding employee arbitration agreements.¹⁴³

For these reasons, the NLRB's *D.R. Horton* ruling was appealed to the Fifth Circuit Court of Appeals, in February 2013, and is currently pending review.¹⁴⁴ The Fifth Circuit, known for its conservative decisions, could overturn the case based on the improper quorum.¹⁴⁵ As the NLRB's leading decision on the validity of arbitration agreements in employment contracts, the invalidation of *D.R. Horton* would exacerbate the confusion among NLRB judges.¹⁴⁶

However, if *D.R. Horton* is overturned, the next case in line for appellate review would likely be *Everglades College, Inc., & Fikki*, as it is the most recent NLRB decision regarding mandatory employee arbitration agreements.¹⁴⁷ Importantly, if the NLRB reviews *Everglades College* in the future, there will be

137. *Id.*

138. *See supra* note 4.

139. *Spears et. al v. MidAmerica Waffles*, No. 2:11-cv-02273-CM-JPO (D. Kan. July 2, 2012). The court reviewed *D.R. Horton* and found that, although *Concepcion* may not speak directly to the issue before the court, it does illustrate a guiding principle: Arbitration agreements are enforceable even when they prohibit the use of a class action. And it stands "against any argument that an absolute right to collective action is consistent with the FAA's 'over-arching purpose' of 'ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.'" *Id.*

140. *Everglades Coll., Inc., & Fikki*, 2013 WL 4140317 at *12-13.

141. *See Sutherland*, 726 F.3d 290; *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831 (N.D. Cal. 2012); *Owen v. Bristol Care*, 702 F.3d 1050 (8th Cir. 2013).

142. *Id.*

143. *See Sutherland*, 726 F.3d 290; *Bristol Care*, 702 F.3d 1050.

144. The Fifth Circuit issued its decision on December 3, 2013. The Court held that the NLRB's quorum was valid. Additionally, the Court determined that the FAA's saving clause did not apply, and neither the NLRA's legislative history nor its text included any congressional command overriding the FAA. Essentially, the Fifth Circuit ruled that the NLRB's decision in *D.R. Horton* violated the FAA. This has not been taken up by the Supreme Court and is specific to the 5th Circuit Court of Appeals.

145. The Associated Press, *Obama could reshape conservative 5th U.S. Circuit Court of Appeals*, Nola, Dec. 26, 2012, available at http://www.nola.com/politics/index.ssf/2012/12/obama_could_reshape_conservati.html, ("The 5th U.S. Circuit Court of Appeals in New Orleans is widely viewed as one of the nation's most conservative federal appellate courts. . .").

146. It is also possible the case would also be reversed due to its interpretation of the FAA and its interpretation of the NLRA. If this happens, it is likely that *Everglades Coll., Inc., & Fikki* will still be taken to the Board and then further appealed to federal court in a different circuit.

147. *See Cellular Sales of Missouri, LLC & John Bauer*, 14-CA-094714, 2013 WL 4427452 (N.L.R.B. Div. of Judges Aug. 19, 2013); *Chesapeake Energy Corp. & Its Wholly Owned Subsidiary Chesapeake Operating, Inc. & Bruce Escovedo*, 14-CA-100530, 2013 WL 5984336 (N.L.R.B. Div. of Judges Nov. 8, 2013); *Securitas Sec. Servs. USA, Inc. & Charles Dunaway & Walter Linares*, S 31-CA-072179, 2013 WL 5984335 (N.L.R.B. Div. of Judges Nov. 8, 2013).

time to ensure that a proper quorum is established. Additionally, *Everglades College, Inc., & Fikki* differs from *D.R. Horton* in that Fikki, an employee, was fired for not signing the mandatory employee arbitration agreement by a specific deadline.¹⁴⁸ This difference makes *Everglades College, Inc., & Fikki* more likely to survive appellate review.

The Supreme Court should take up *Everglades College, Inc., & Fikki*, or a case with similar facts, as soon as possible, in order to establish a uniform standard rule regarding employment arbitration agreements, and to eliminate confusion. The Court must make it clear that when a collective interest of concerted action, a statutory right under the NLRA,¹⁴⁹ is involved the FAA's liberal interpretation favoring arbitration conflicts with Congressional intent underlying the NLRA and creates a public policy issue which no court has yet addressed.¹⁵⁰ The Supreme Court should rule that the FAA's preference for arbitration must give way, not only because section 7 of the NLRA is a statutory right, but also because it is based on concerted activity of section 7 rights. To rule otherwise would chill employee rights, statutorily guaranteed under the NLRA, and would empower employers to unjustly fire employees that attempt to enforce their statutory rights.

Until the Supreme Court decides and explains interrelationship of the FAA and the NLRA, and promulgates standards by which employers must abide and to which employees can agree, there will be no uniform law on the enforceability of mandatory employment arbitration agreement waivers of class arbitration. The lack of legal uniformity will not only cause increased litigation, but a misunderstanding and mistrust of laws that produce such varied results in cases where the facts are so similar.

VI. CONCLUSION

Everglades College, Inc., & Fikki elucidates the deepening split in the law surrounding mandatory employee arbitration agreements. The Supreme Court should make a uniform standard for such agreements to ensure that employees can enforce their statutory rights. Without a uniform standard, litigation of this conflicting issue under the NLRA and FAA will continue, and even more time and money will be expended in pursuit of a uniform standard. The Supreme Court must develop a uniform standard to inform employers of the limitations placed on employment contracts, and to ensure that employees know the extent of, and can vindicate their statutory rights.

MARCY GREENWADE

148. *Everglades Coll., Inc., & Fikki*, 2013 WL 4140317 at *12-13. The agreement also disallowed any class or collective claims, unless otherwise legal. *Id.*

149. See 29 U.S.C.A. § 157.

150. See *supra* note 50.